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6 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

7 UNITED STATES OF AMERICA,

8 Plaintiff,

9 v.

10 JUAN JOSE ALCALA-
11 VELASQUEZ,

12 Defendant.

NOS. CR-02-312-RHW
CV-07-272-RHW

**ORDER DISMISSING
DEFENDANT'S MOTION UNDER
28 U.S.C. § 2255 TO VACATE, SET
ASIDE, OR CORRECT
SENTENCE BY A PERSON IN
FEDERAL CUSTODY**

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14 Before the Court is Defendant Juan Jose Alcala-Velasquez's Motion under
15 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal
16 Custody (Ct. Rec. 75).

17 Defendant plead guilty to Conspiracy Distribute a Controlled Substance in
18 violation of 21 U.S.C. § 841(a)(1). On July 9, 2004, the Court sentenced him to
19 120 months in prison, 5 years supervised release, and a \$100 criminal monetary
20 penalty . Defendant appealed his sentence and the Ninth Circuit affirmed. The
21 mandate was received on August 16, 2005.

22 Pursuant to Rule 4 of the Rules Governing Section 2255 Proceedings for the
23 United States District Courts ("Rule 4") the Court must independently examine a
24 Section 2255 motion to determine whether summary dismissal is warranted.
25 Dismissal is appropriate if the movant's "allegations, viewed against the record,
26 either fail to state a claim for relief or are so palpably incredible or patently
27 frivolous as to warrant summary dismissal." *Marrow v. United States*, 772 F.2d
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1 525, 526 (9th Cir. 1985); *see also United States v. Leonti*, 326 F.3d 1111, 1116
2 (9th Cir. 2003).

3 On November 6, 2007, the Court entered an Order to Show Cause Why
4 Summary Dismissal is Not Appropriate (Ct. Rec. 76). On December 13, 2007,
5 Defendant filed his response. Defendant asserts that he has been pursuing his
6 rights diligently from the date when he had knowledge of the possibility of post-
7 conviction relief. Defendant argues his attorney's failure to indicate that he had
8 one year to file a habeas petition was so egregious and atypical, which resulted in
9 extraordinary circumstances justifying equitably tolling the one-year statute of
10 limitation of the Anti-Terrorism and Effective Death Penalty Act. Defendant also
11 argues that he needed to spend time to enhance his English skills prior to filing his
12 habeas petition.

13 The Court finds that Defendant has not met his burden of showing that the
14 statute of limitations should be equitably tolled.

15 Accordingly, **IT IS HEREBY ORDERED:**

16 1. Defendant's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or
17 Correct Sentence by a Person in Federal Custody (Ct. Rec. 75) is **DISMISSED**.

18 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
19 Order and provide a copy to the Defendant.

20 **DATED** this 28th day of March, 2008.

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22 *s/Robert H. Whaley*

23 ROBERT H. WHALEY
24 Chief United States District Judge

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TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN
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